INDEX

	Page
Motion for Leave to File Second Petition for Rehearing	3-11
Motion to Recall, If Necessary, Certified Order Sent by Clerk to Court of Appeals, Par. 11 of Motion	10
Second Petition for Rehearing	13-18

TABLE OF CASES

American Exchange Trust Co. v. Trumann Special School District, 183 Ark. 1041, 40 S. W. (2d) 770	4, 14
Erie Railroad Co. v. Tompkins, 304 U. S. 64	4, 15
Hampton v. Hickey, 88 Ark. 324	14
Horne v. Paragould Special School District, 186 Ark. 1000, 57 S. W. (2d) 568	5, 16
Partnis v. Williams, 137 Ark. 425	13
Schmutz v. Special School District of Little Rock, 78 Ark. 118, 95 S. W. 438	4, 5, 14, 15
Shapleigh v. San Angelo, 167 U. S. 648	16, 17
Sovereign Camp W. O. W. v. Gillespie, 87 Fed. (2d) 944	17
Title Oil Co. v. Flannagan, 263 U. S. 444	16
Women's Catholic Order of Foresters v. Special School District of North Little Rock, 105 Fed. (2d) 716	3

In the
Supreme Court of the United States

OCTOBER TERM, 1941

No. 354

GEORGE E. MORTON, Trustee, and
CITY NATIONAL BANK, Trustee, and
Individually ..... Petitioners

vs.

DARDANELLE SPECIAL SCHOOL DISTRICT
NO. 15, YELL COUNTY ARKANSAS ..... Respondent

MOTION OF PETITIONERS FOR LEAVE TO FILE A SECOND PETITION FOR A REHEARING AND FOR RECALLING CERTIFIED ORDER— SEE PARAGRAPH 11 BELOW

Come the petitioners, by their counsel, and respectfully move this Court for leave to file a Second Petition for Rehearing, which motion is based upon the following grounds:

1. The Court of Appeals in this case based its affirmance of the cause upon the untenable ground that said Court of Appeals in the case of *Women's Catholic Order of Foresters v. Special School District of North Little Rock*, 105 Fed. (2d) 716, had decided the question of impairment of contracts against the contentions of petitioners. An examination of the opinion of the Court of Appeals in said last cited case demonstrates to a mathematical certainty that the question of the impairment of contracts was not raised by the parties in that case and hence not decided by the court. It therefore follows that every-

thing said by the Court of Appeals in said North Little Rock case is wholly *obiter dictum* and is not binding upon said Court of Appeals nor upon this or any other court. This question is fully discussed in our Petition for Rehearing—See index thereof.

2. This error alone is sufficient to demand of this Court as a matter of justice and right the granting of the petition for a rehearing and the granting of the writ of certiorari.

3. It has never been held either by this Court or any other court to our knowledge that an *obiter* decision is sufficient in force and power to repeal the contract clause of the Constitution of the United States.

4. It is claimed by the respondent that the Court of Appeals in the instant case decided and held that the instant case was controlled by the decision of this Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64. We challenge the correctness of that contention. But if true, it shows a basic and untenable error on the part of the Court of Appeals for which there should be a reversal.

5. The Court of Appeals as a matter of absolute law was compelled, and is compelled, to accept the decision of the Supreme Court of Arkansas in the case of *Schmutz v. Special School District of Little Rock*, 78 Ark. 118, 95 S. W. 438, and the case of *American Exchange Trust Co. v. Trumann Special School District*, 183 Ark. 1041, 40 S. W. (2d) 770. This, in our opinion,, is absolutely certain by reason of this Court's opinion in the *Erie Railroad Company* case. In the cases cited the Supreme Court of Arkansas not only held that the board of directors of the school district had the power to pledge the revenues, but in the same opinions declared that the statute itself pledged the revenues, thus making the pledge of the revenues at the time these bonds were issued absolutely certain and binding upon this Court and all other courts.

6. It is also certain in our opinion, beyond a shadow of doubt, under the decisions of the Supreme Court of Arkansas in existence at the time of the issuance of these bonds, that there was an enforceable contract to repay the

borrowed money. All that the Court of Appeals said on this subject is really and truly beside the question. The school district had no other means under the sun to repay the borrowed money except from the revenues of the district. These revenues were dedicated to the purpose of repayment by the statute and by the decisions of the Supreme Court of Arkansas in the cases referred to.

7. All that the Court of Appeals said in its opinion as to "later decisions" of the Supreme Court of Arkansas is plainly *obiter*, for the reason that the Supreme Court of Arkansas in the *Horne* (186 Ark. 1000, 57 S. W. (2d) 568) and *Pledger* (189 Ark. 562, 74 S. W. (2d) 646) cases make it plain that the statutes (Act 169 of 1931 and also Act 28 of 1933), as construed by the Supreme Court of Arkansas, give power to the electors of the district that did not exist at the time of the issuance of these bonds.

8. It is undisputed that, based upon the decisions of the Supreme Court of Arkansas in the *Schmutz* and *Trumann* cases, more than twenty-three millions of dollars of bonds were issued by special school districts and that a large number of these bonds is still outstanding. It follows from what is said above, and what is said in our first petition for a rehearing, that the Acts of Arkansas above referred to (169 and 28) absolutely destroy the bonds sued on. The district received the cash for these bonds. It constructed with said cash necessary school buildings. It has used the buildings constructed by the proceeds of the bonds of 1926 for fourteen years. It received more than $100,000 as the proceeds of the second bond issue, which bond issue was issued at the very depth of the great depression. Without that bond issue the district could not have paid its former debts and built a high school. It has used that building for ten years and its previous debts were paid by the proceeds of that issue. These facts establish beyond the shadow of a doubt that the Acts of Arkansas complained of, as construed by the Supreme Court of that State, not only impair the obligation of the contract in violation of petitioners' rights under the contract clause of the Constitution of the United States, but also in effect deprive the petitioners of their property in the

bonds without due process of law and in violation of their rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States. If this Court refuses to grant the writ of certiorari, it will approve the decision of the Court of Appeals of the Eighth Circuit which decision gives power to a State Legislature to abolish a clause of the Constitution of the United States.

For these reasons, and upon the reasons given in our first petition for a rehearing, and upon the second one printed below to which we respectfully refer this Court, in our opinion there is no escape from granting the petition for certiorari as a matter of justice and right. We are not, however, basing this application solely upon that ground. We are basing it upon the further ground that the petitioners will suffer irreparable damage and injury by the failure of this Court to take jurisdiction and decide this case as the law and justice may warrant.

9. In our opinion the most unteniable and astounding declaration of the Court of Appeals is that the board of directors of the school district was without power to pledge the revenues. In order that the Court may understand this point it is necessary to make a short explanation. In the final decree of June 28, 1938, the District Court (R. 70) and in the findings of facts and declarations of law of that decree (R. 60-80) and see specially the findings and declarations on pages 76-77, declared absolutely *that the school district had power to pledge the revenues.*

That decree which was a final decree in support of our statement above has this specific language (R. 77) "That at the time of the execution of said respective deeds of trust and the issuance of said bonds, the district was duly authorized and empowered to borrow money and mortgage the real property of the district and pledge its future revenues to secure the payment thereof." The district could act only through the board of directors hence said district court declared as a matter of law that said board had power to pledge the future revenues. The Supreme Court of Arkansas so declared in the *Schmutz, Trumann* and *Partuis* cases cited in the petition for rehear-

ing and in our brief on petition for certiorari. We have shown in our first petition for rehearing as well as in our brief for certiorari *that the statute itself* (Act 248, 1905 as amended) *pledges the future revenues to repay the bonds.* The respondent had filed no pleading at or prior to said decree of June 28, 1938, asserting that the board of directors nor the school district had no power to pledge the future revenues. *The district took no appeal whatever from the decree of June 28, 1938.*

More than a year after said decree had become final the district filed an attempted defense (R. 83) setting up alledged defenses which are wholly unteniable. The said response (R. 83) is wholly ineffective, not only because the district never appealed from said final decree but also for the reason that no court of justice will ever permit a natural person to make such a defense. Act 248 as amended prohibits the school district from setting up any defense which would not be available to a natural person.

In addition the decree of June 28, 1938, reserved no right to the school district to have the rights given to the petitioners set aside. *The only power which the District Court reserved in said final decree was the power to enforce the rights of the parties* (R. 79-80). The ~~respond-~~ Petitioners ents moved in the District Court to enforce their rights under said decree on February 6, 1939, praying an order to allocate the entire eighteen mills to the payment of the bonded debt. The bond owners had the right to ask that relief for the unanswerable reason that the final decree had declared that said bonds were a first lien on all the future revenues of the district (R. 76-77). Said final decree on this subject has this language (R. 79-80). "The court reserves jurisdiction of this cause to enter such further or other orders as may be necessary to enforce the rights of the parties hereto and to direct a sale of the real property of said district, should it become necessary to sell the same."

Petitioners motion to enforce their rights under said final decree clearly comes within the above language. The districts so-called defenses (R. 83) praying in effect that all future revenues on which bond holders had a prior lien

be used exclusively to operate the schools does not come within such language. To authorize a litigant to any relief there must be some pleading. The district filed no pleading entitling it to such relief until said final decree was more than a year old. This plain error of the Court of Appeals stresses the misconception of the issues by said court and also demonstrates that there was no issue before that court on that record challenging the power of the directors to pledge the revenues. Since the issue of the power of the directors was never made until long after the final decree and since the district filed no motion for a rehearing nor made any effort to set aside said decree it follows as a matter of law and justice that the petition for certiorari should be granted. These questions necessarily arose on the record in petitioners petition for certiorari and are fully discussed and earnestly urged in our first petition for a rehearing. The index in that petition locates to a certainty the pages where found.

10. *The questions involved are of the highest importance to all special school districts of Arkansas and to the owners of the millions of dollars in bonds of the special school districts of the state.* The amount of the indebtedness involved being the amount of the bonds owned by the petitioners and the interest thereon approaches $200,000.

In our application for the writ and our brief thereon we show that the public records of Arkansas establish the fact that more than twenty-three millions of bonds were issued and sold after the decision in the *Schmutz* case and before the passage of 169 and 28 elsewhere referred to. Respondent claims that a large amount of said bonds have been refunded. There is no evidence to show the amount of refunding. In our reply brief we called the attention to the fact that at least half of the original issue is still outstanding. But this suggestion of respondent when properly analyzed shows the great wrong done to bond owners by the passage of Acts 169 and 28. The purpose of an act of the legislature may easily be established by its effect. It is reasonable to infer the purpose of the act from its effect. The effect of 169 as construed by the Supreme Court of Arkansas is to frighten terribly all bond owners

of special school districts of Arkansas. Such act necessarily destroys the value of all special school district bonds.

It does so because it gives to the elector a power which did not previously exist to destroy said bonds by voting eighteen mills without stating the purpose for which said mills are voted, the Arkansas court holding that such a vote authorized the use of all the proceeds of said eighteen mills for operating the schools, thus plainly desregarding amendment number eleven to the Constitution of Arkansas which names three purposes for the use of said eighteen mills. Naturally the effect of such a ruling as in the *Horn* case is to notify the elector that he is given a new power which enables him to destroy the value of all special school district bonds. Hence the effect of such statutes as construed by the Supreme Court of Arkansas is clearly confiscation, pure and simple. There can be no escape from these plain facts. We therefore believe that justice and right demand that the petition for certiorari should be granted. If such writ is not granted uncertainty and doubt as to the value of millions of dollars of special school district bonds create a horrible condition as to financial dealings in such bonds. In other words who can foretell when such bonds are issued though valid they will have any real value whatever. The special school districts of Arkansas cannot maintain schools without buildings. The proceeds of these bonds constructed necessary school buildings without which no schools could be had. The purchasers relied upon the honor and the integrity of the school district and upon the representations that the revenues were pledged to repay and upon the representation that the district would repay as provided in the proceedings and now the district contends that it will pay only forty-two cents on the dollar thus confiscating fifty-eight cents of every dollar. It would seem clear that the confiscation of fifty-eight cents of every dollar of two hundred thousand dollars plainly establishes the impairment of the contracts.

We sincerely and firmly believe that if this court can re-read our petition for rehearing and re-study the auth-

orities and statutes therein cited there can be no escape from granting the petition for certiorari.

11. On November 24 after our motion for leave to file the second petition for a rehearing had been placed in the hands of the printer with a copy of said petition the writer received a letter from the clerk of this court advising that on October 18 said clerk had forwarded to the clerk of the Circuit Court of Appeals of the eighth circuit a certified copy of the order denying the first petition for a rehearing. The writer had previously telegraphed the clerk asking that any order be withheld until the second petition could be printed and filed.

We find no rule or law limiting the power of this court to sustain this motion for leave after a certified copy of the order has been sent to the clerk of the lower court. The telegrams and letters between counsel for the petitioners and the clerk show diligence on the part of counsel in preparing and presenting the motion for leave and the motion to recall the order. We request the clerk to produce these telegrams and letters for the information of this court. Besides the documents were presented at the same term of the court and while the court had full and complete power over all its orders. We suggest and urge that in the circumstances it would be harsh and unconscionable for this Court, a Court that loves justice, to deny the rehearing as such denial would inflict upon petitioners an irreparable loss without fault of petitioners. We call this Courts attention to the letter of the clerk suggesting that a second petition for rehearing was not authorized as a matter of right and that such petition must be preceded by motion for leave to file. Said letter made no mention of the sending of the certified order. We place no blame upon the clerk. We are placing all facts before this court. We therefore pray that said order be recalled if necessary and that petitioners be granted the relief prayed for. We telegraphed the clerk asking that the order be withheld at once upon receiving a letter from the clerk advising that a motion for a leave to file a second petition should precede said second petition.

We therefore, upon the matters above stated, and up-

on those set forth in our first petition for a rehearing, respectfully pray this Court to grant the petition for a rehearing and to grant the application for a writ of certiorari and to place the case upon the docket and hear oral argument and further briefs, if necessary.

We regret the length of the motion for leave and of the second petition for rehearing. The great importance of the questions involved and the amount involved made it our duty as counsel for petitioners to present the questions to this court as we have done notwithstanding said documents are slightly longer than we wished.

The petitioners herewith submit along with this motion for leave to file same a copy of the Second Petition for a Rehearing, and have filed the original of the same with the Clerk of this Court in this cause, and have also filed the original of this motion for leave to file same.

Respectfully submitted,

JAMES B. McDONOUGH,
3627 Free Ferry Road,
Fort Smith, Arkansas.

J. W. HOUSE,
Boyle Building,
Little Rock, Arkansas
Counsel for Petitioners.

JUSTIN D. BOWERSOCK,
Kansas City, Missouri
Counsel for Amicus Curiae.

S. L. WHITE,
Union National Bank Building,
Little Rock, Arkansas
Of Counsel for Petitioners.

CERTIFICATE OF COUNSEL

We, James B. McDonough and J. W. House, certify that they are members of the Bar of this Court, and that they have carefully re-examined the questions involved in this second petition for a rehearing, and also involved in the first, and also involved in the petition for writ of certiorari, and in our opinion, if justice and right is to prevail, there cannot be any escape from the granting of the petition for certiorari and that the second petition for rehearing is not filed for delay but that justice may be done.

JAMES B. McDONOUGH,
J. W. HOUSE,
Counsel for Petitioners.

No. 354

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1941

GEORGE E. MORTON, Trustee, and
CITY NATIONAL BANK, Trustee, and
Individually ..... Petitioners

vs.

DARDANELLE SPECIAL SCHOOL DISTRICT
NO. 15, YELL COUNTY, ARKANSAS ..... Respondent

SECOND PETITION OF PETITIONERS FOR A REHEARING

Petitioners have prepared this second petition for a rehearing, the same to be treated as the original and to be attached to and printed with the motion for leave and to avoid repetitions as far as possible the petitioners request that the above motion be treated as a part of this second petition for a rehearing as though set out in full herein; and for the same reason petitioners request that their first petition for a rehearing be treated as a part hereof as giving the basic reasons for the granting of the petition for certiorari.

Article 14 of the Constitution of the State of Arkansas makes it the bounden duty of the state legislature to provide for the children of the state an efficient system of free schools. The state has endeavored to comply with that high duty by providing for donations and loans from state funds to aid needy school districts.

The high school is a part of such school system. By Act 13 of the legislature of 1869 authority is given to the electors of school districts in cities and towns for the better management of schools by the election of six directors to whom is confided the entire management and control of all schools in special school districts (see *Partuis v. Williams*, 137 Ark. 425). Before the state legislature pro-

vided for aid to needy school districts it became necessary for special school districts in cities and towns to borrow money to build necessary school biuldings, since there could be no schools without necessary buildings. The first general act of the state legislature giving full and complete authority to the board of directors to borrow money was act 248 of 1905. Of course the authority given to the directors to borrow money necessarily carried with it the power to provide the means of repayment and also the power to contract to repay. Such implied power exists in the board without any specific statutory authority therefor. Said Act 248 gave ample and specific authority to provide the means of repayment and to make a valid contract for repayment. The only means of repayment was the future revenues of the district. The Arkansas Supreme Court held that the general Act 248 as amended in 1913 and 1917 was broader in the grant of powers than any of the special acts (*Hampton v. Hickey*, 88 Ark. 324). In addition to that said Supreme Court of Arkansas in *Schmutz v. Little Rock Special School District*, 78 Ark. 118 and in *American Exchange Trust Co. v. Trumann Special School District*, 183 Ark. 1041, decided after Act 169 of 1931 was passed, held in construing said act 248 of 1905 as amended that the board of directors had power to pledge future revenues for repayment of the borrowed money. The Schmutz case was decided in 1906, the Trumann case in May, 1931. In those decisions the Supreme Court of Arkansas also held that the statute itself pledged the revenues to repay the bonds.

The respondent in its brief opposing the writ of certiorari admits that said statutes seem to grant the power to the board to pledge the revenues and seeks to escape the effect of that admission by claiming that the *Horne* and *Pledger* cases were mere changes in the law. That contention is based upon the clearly erroneous opinion of the Court of Appeals. During the period following the decision in the *Schmutz* case in 1906 up to the passage of 169 of 1931 the special school districts in Arkansas relying upon Act 248 as amended issued and sold in the public markets more than twenty-three millions of dollars of such bonds. During that twenty-five years of bond sell-

ing no court and no attorney to our knowledge in Arkansas doubted or questioned the authority of the board to pledge the revenues and no doubt was ever raised that the statute itself pledged the revenues. These facts are matters of public history and were well known to the people of the state and to all its officials.

Under such state of the law the petitioners bonds were issued and sold to innocent purchasers who relied upon the good faith and integrity of the school district and its representations that a building fund which is nothing but a sinking fund or repayment fund had actually been duly provided. The proceedings of the board so assert and name the amount of the principal and interest which would be paid from the future revenues for each year.

It will thus be seen that all went well with the school districts and the bond buyers until the passage of 169 on March 25, 1931. In these circumstances it is plain that the Court of Appeals and this court also are bound by the decisions of the Supreme Court of Arkansas in the *Schmutz* and *Trumann* cases above cited. The Arkansas Court in those cases was construing the state's own laws and constitution, and the Federal courts under the authority of *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 are bound thereby.

It follows that the Court of Appeals was without power to say that the directors had no power to pledge the revenues. Besides the said lower court entirely overlooked and disregarded the decision in the *Schmutz* case to the effect that the statute itself pledged the revenues. Since the statute pledged the revenues without doubt the directors had such power.

In these circumstances it becomes necessary to inquire whether the decisions in the *Horne* and *Pledger* cases were mere changes in the law or whether Acts 169 and 28 impaired the obligation of the contract to repay. We have quoted from the *Schmutz* and *Trumann* cases in our original brief and in part in our petition for rehearing. We refer this court to said brief and said petition for the exact language establishing our contention that the Arkansas Court in these cases plainly held that the board of directors

had the power to pledge the revenues and that the statute itself pledged them.

The purpose of Act 169 is determined by its language and by its effect. The legislature in Act 169, section 196 thereof, specifically repealed all laws in existence at the time of the issuance of these bonds (see Acts 1931, page 584). Said Act 169 begins on page 476 and ends on page 588. For issuing bonds under said Act see Sections 59-69. The Supreme Court of Arkansas in construing that act in the case of *Horne v. Paragould Special School District*, 186 Ark. 1000 and in the case of *Pledger v. Cuttrell*, 189 Ark. 562 based its decision on said act. In those cases in construing said act said court gave power to the electors enabling them by a vote to allocate the whole of the eighteen mills to the operation of the schools. That power did not exist in the electors at the time that these bonds were issued and only existed by reason of said act. Those decisions construing said act enabled the electors to confiscate the property value in the bonds and thus necessarily impair the obligation to repay. This brings the instant case squarely within the rule declared by this court in the case of *Shapleigh v. San Angelo*, 167 U. S. 648 and the case of *Title Oil Co. v. Flannagan*, 263 U. S. 444. See other cases cited in our original brief and in our first petition for a rehearing.

Before a great court like this one, it is our view that it is not necessary to discuss in detail these questions which are named and set out in our motion for leave to file. Our view is, and we say this with the very highest respect for this Court and every member thereof, that through some kind of inadvertance unknown to us, the Court has misunderstood the actual questions involved. We have discussed this case in our petition for rehearing and have there set out the basic reasons upon which our contentions are based. *It is startling to us that in a case as important as this one, and involving the setting aside of the contract clause and of the Fourteenth Amendment to the Constitution of the United States, that any court can say that the agreement to repay the borrowed money is not impaired, and that the annulment of the contract*

clause as well as the annulment of the Fourteenth Amendment is not a matter which should interest this Court to the extent that the petition for certiorari should be granted. With highest respect possible, we earnestly urge that there is not a decision either from this Court or from any other court, save and except the erroneous decision of the Court of Appeals, that will give the power to a State Legislature to annul two clauses of the Constitution of the United States. The mere statement of the question is sufficient to require, as we believe, the granting of the writ of certiorari. Without which these bonds can never be paid. We respectfully request the Court to re-examine and re-read the controlling decisions from this Court and from other courts. It would make this second petition entirely too long to quote from those decisions. The decision of the Court of Appeals in the instant case is squarely in conflict with the decision of the same court in *Sovereign Camp W. O. W. v. Gillespie,* 87 Fed. (2d) 944, and the refusal of this Court to grant the writ of certiorari is squarely in conflict with the decision of this Court in *Shapleigh v. San Angelo,* 167 U. S. 648, and other cases cited on page 17 of our first petition for rehearing. In the *San Angelo* case the exact question came before this Court. In that case the Legislature of Texas passed a law giving the electors in the muncipality the right to say whether or not the new bonds should be held valid. This Court held that the granting of a power to the electors which did not exist at the time of the issuance of the bonds, was an impairment of the contract of repayment embodied in the bonds. In our opinion, the suggestion of the Court of Appeals that the power to pledge the revenues did not exist is in the teeth of the decision of the Arkansas Court in the *Schmutz and Trumann cases, and is in violation of every rule established by this Court from its foundation down to the present time.*

We respectfully urge that there is no authority or decision of any court that will sustain this Court in the refusal to issue the writ of certiorari. We are trying to be frank with this Court. All we have the power to do is to lay before this Court its own decisions and the decisions of other courts, and that we have done in our orginal

brief herein, and also in our petition for a rehearing, and we respectfully refer the Court to those cases in confidence that *the Court cannot possibly find any support either in statute or decision that will sustain the refusal to grant the petition for certiorari.*

Respectfully submitted,

JAMES B. McDONOUGH,
3627 Free Ferry Road,
Fort Smith, Arkansas.

J. W. HOUSE,
Boyle Building,
Little Rock, Arkansas.
Counsel for Petitioners.

JUSTIN D. BOWERSOCK,
Kansas City, Missouri
Counsel for Amicus Curiae.

S. L. WHITE,
Union National Bank Building,
Little Rock, Arkansas
Of Counsel for Petitioners.

CERTIFICATE OF COUNSEL

We, James B. McDonough and J. W. House, members of the Bar of this Court, hereby certify that we mean no disrespect to this Court nor any member thereof. We are sincere in the belief that a serious and grave error is about to be committed. The bond owners bought their bonds in good faith. And we further certify that in our opinion this second petition for rehearing is filed, not for delay, but that justice may be done.

JAMES B. McDONOUGH,
J. W. HOUSE,
Counsel for Petitioners.